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No. 565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ARIS GLOVES, INC.,

Petitioner

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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PETITIONERS REPLY BRIEF

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I. "Concessions" Means Reductions of Duties, Not Increases

To our demonstration that "concessions" is used

> "in trade agreements, statutes and other official sources to mean, either in terms or in context, only reductions or bindings",

respondent replies that

> "these instances do not show that when 'concessions' is not so limited explicitly or implicitly, it nevertheless continues to have only this limited meaning." Respondent's brief, 6, fn. 3 (hereinafter Resp. Br.)

The "meaning" of a word is gathered from the meaning which is attached to it by invariable use. In the tariff-agreements area, "concessions" had never been used to "mean" duty increases; it was used only to mean duty reductions and bindings. By virtue of this meaning given to 'concessions' by GATT, the President, the Congress and the administrators themselves, it became what respondent labels a "term of art", Resp. Br. 5, a term of restricted meaning, *Suwannee Fruit & S.S. Co.* v. *Fleming*, 160 F.(2d) 897, 899 (Em. App.), a term with a built-in "limit".

Respondent asserts that "as used in GATT "concessions" "describes increases, bindings and reductions of duty", Resp. Br. 5. This is a bald assertion which flies in the face of a mass of proof to the contrary. Petition for Certiorari, 7-9 (hereinafter Pet. Br.). True, the

> "*objective* of reduction of the general level of tariffs may be attained by an agreement which lowers the rates on most items, but which may increase them moderately on a few." (Resp. Br. 6) (emphasis supplied throughout)

The issue, however, is not how to obtain this "objective", but whether the use of the word "concessions", consistently identified with "reductions" by both public and administrators, gave "reasonable notice" of an intention to negotiate increases. The existence of statutory power to attain objectives does not without more give warning that it will be exercised to the full on a particular occasion. Such a warning was rendered indispensable by the fact that the overwhelming mass of negotiations had theretofore been concerned with reductions, only 1 or 2 increases having been negotiated prior to the Torquay Agreement in suit. Pet. Br. 5.[1]

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[1] Respondent does not dispute that only one or two genuine increases were effected prior to Torquay as against thousands of reductions. Pet. Br. 5. Nor does it dispute that only 3 increases as against thousands of reductions emerged from the Notice in suit. Id. at 14.

Respondent would assimilate the 1947 notice of intention to conduct "trade agreement *negotiations*" under which "some increases were effected" with the notice in suit of intention to negotiate "mutually advantageous tariff *concessions*." Resp. Br. 6. "Trade agreement negotiations" covers the entire spectrum, increases as well as reductions; any one who is notified of such "negotiations" is forewarned that increases may be negotiated. But "concessions" was virtually synonymous with "reductions", and notice of a "purpose" (Pet. Br. 3) to negotiate *concessions* gave notice of restricted, not unlimited, "negotiations".

As to respondent's claim that there were "hundreds" of increases, all of its citations date *after* the Notice in suit. Resp. Br. 7-8.[2] If they were no more adequately noticed than that Notice, they merely compound the illegality and show persistence in a course of misleading conduct. By 1955, the date of respondent's first citation, there was not alone the prior identification of "concessions" with reductions in GATT and in the Executive Order, Pet. Br. 7-11, but the unmistakeable identification in § 1363 of the Act, id. at 11-12, about which, parenthetically no comment is made by respondent. These three sources (putting the administrator's own similar interpretations aside) gave "concessions" a meaning which was binding upon respondent.

The *first* State Department *definition* to include an "increase of duty" within the definition of "concessions", Resp. Br. 8, was issued in 1958, 6 years after petitioner alleged that the Notice was illegal, R. 4. Not alone does it smack of a self-serving declaration,[3] but

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[2] The first cited State Dept. Publ., 6001/152, was published in 1955, the last, 6775/170, in 1958.

[3] Moreover it departs from an unvarying line of administrative statements which omitted or differentiated increases from "concessions"; Pet. Br. 12-15, cf. id. at 7-9:

"Against the Treasury's prior long standing and consistent

> "Where an act of an official plainly falls outside the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 136.

Consider too that the statute does not merely require "notice"; it demands "reasonable notice", i.e. notice "suitable to the case",[4] such

> "as may fairly and properly be expected or required in the particular circumstances."[5]

Among the "circumstances" is the undeviating identification prior to the Notice in suit of "concessions" with "reductions", in GATT, Executive Order, statute and administrative pronouncements. Pet. Br. 7-15. Even today that identification remains imprinted in the public mind.[6] Against this background plus the history of tens of thousands of reductions, could the public "fairly" draw from the Notice of a "purpose" to negotiate "mutually advantageous concessions" a warning that respondent intended to negotiate increases? The fact that a lynx-eyed lawyer for respondent—long after the event—could espy a few

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interpretation, its more recent ad hoc contention as to how the statute should be construed cannot stand." *United States* v. *Leslie*, 350 U.S. 383, 396.

[4] *Commonwealth* v. *Central District Tel. Co.*, 243 Pa. 586, 590 (1914).

[5] *Sterling Mfg. Co.* v. *Hough*, 49 Neb. 618, 621 (1896); *State* v. *Aronson*, 330 S.W. (2d) 140, 144 (Mo. App. 1959).

[6] Pet. Br. App. 7-8. The current discussion of a new trade-agreement is replete with references to substitution of presidential power to negotiate across-the-board reductions with the Common Market for the present power to negotiate piece-meal "reductions," *never* a reference to increases. There is no need to burden the Court with additional quotations for it reads the newspapers.

increases[7] buried among 55,000 reductions, Pet. Br. 5, shows at best that what respondent *did* was at war with what it repeatedly *stated* to and led the public to believe. Pet. Br. 7-9, 12-15, 18-20. It does not constitute a notice "suitable to the case", a notice that would warn, not entrap, those who looked to it for protection, a notice, simply put, of a purpose to negotiate "reductions, bindings, increases and all other tariff arrangements".

II. The General Reference to "Modifications of Duties" Did Not Enlarge the Stated "Purpose" to Negotiate "Concessions"

Respondent is significantly silent about the administrators' interpretations of the Notice published immediately after it issued. Pet. Br. 18-20. Those interpretations substitute "concessions" for the phrase "modifications of duties and . . . import restrictions" upon which the court

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[7] Not once were these few "increases" labeled as concessions; they were "upward adjustments"; reductions or "compensatory *concessions*" were made *for* "increases".
So in State Department Publ. 6001 / 152, p. 2 (1955):

> "As compensation to the United States for this upward adjustment, Italy has agreed to reduce the rates on two items."

Again,

> "As compensation to the United States for these increases, rates have been reduced . . . The United States also benefits indirectly from *compensatory concessions* received by other countries." Id. 6201/154, p. 5 (1955).

And Cuba and the Dominican Republic

> "Agreed that United States *concessions* in the new negotiations not only *balanced* the new *concessions* it was offering to the United States but also would *compensate* for the increases in the liquid sugar rates . . ."

Such statements reflect not only the awkwardness of fitting increases into the connotation of "concessions" but an administrative recognition that increases were something apart, something which was not "conceded" but "upward adjustments" which had to be "compensated" for.

below relied to illuminate the meaning of "concessions". Pet. Br. 3. This silence confesses that Respondent cannot explain away these substitutions, that it cannot justify a repudiation of the governments own prompt identification of "modifications" with "concessions, and that it cannot ask this Court to hold that a layman should have read the Notice in a quite different sense than the government itself promptly assigned to it. Pet. Br. 5, 18-20.

The argument that "modifications" echoed the statutory phrase, Resp. Br. 8, ignores the legislative history of the phrase and its marriage to 55,000 reductions as against a handful of surreptitious increases. Pet. Br. 15-17. Any doubt is dispelled by the administrators' own immediate identification of "modifications" with "concessions".

Nor is the presence of the words "additional import restrictions" helpful to respondent, Resp. Br. 9, because it too was caught up in the immediate administrative substitution of "concessions" for the entire phrase in the Notice: "possible modifications of duties and other import restrictions, imposition of additional import restrictions . . .", showing that "reductions" alone were in contemplation.

Respondent erroneously suggests that we demand that there be notice of an intention to negotiate

> "as to a particular article on the list, an increase in duty . ." Resp. Br. 9.

We simply urge that "reasonable notice" requires notice that *some increases* will be negotiated.

It is no answer that there was notice that "gloves were to be the subject of possible negotiation," Resp. Br. 9, when the Notice was for the stated

> "*purpose* of negotiating mutually advantageous *concessions*".

Conclusion

Respondent urges that the decision below "does not conflict with the decisions of this Court or any other court". Resp. Br. 4. But there are other "special and important reasons" for review in this Court. No case is more important than correction of governmental action which is *plainly unlawful* and injurious. We delegate vast powers on faith that they will not be abused. When clear abuses go unchecked arbitrariness is emboldened, confidence in the democratic process is shaken.

This Court has sheltered a single alien branded as an "unsavory character" by the Attorney General from *an unlawful* deportation, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260; it has protected a solitary federal employee from unlawful discharge as a "security risk", for failure to comply with departmental regulations, though they were more rigorous than the statute required, *Service* v. *Dulles*, 354 U.S. 363; it has shielded a soldier from an *unlawful* discharge in a form that was otherwise than "honorable", though the government sought to insulate the illegality behind an alleged lack of jurisdiction to review. *Harmon* v. *Brucker*, 355 U.S. 579. Shall it be said that the patently unlawful impairment of an established livelihood is less important?

Respectfully Submitted,

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January, 1961